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In the Supreme Court of the United States

OCTOBER TERM, 1979

ROBERT G. BUCKNER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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INDEX

Page

Opinions below 1

Jurisdiction 1

Questions presented 1

Statement 2

Argument 5

Conclusion 10

CITATIONS

Cases:

Bruton v. *United States*, 391 U.S. 123 ..... 9, 10

Cohen v. *United States*, 297 F. 2d 760, cert. denied, 369 U.S. 865 7

Dutton v. *Evans*, 400 U.S. 74 9

Gissendanner v. *Wainwright*, 482 F. 2d 1293 10

Sansone v. *United States*, 380 U.S. 343 6

Siravo v. *United States*, 377 F. 2d 469 7

Smith v. *Commissioner*, 48 T.C. 872, aff'd, 424 F. 2d 219 4

United States v. *Campione*, 416 F. 2d 486, cert. denied, 397 U.S. 909 6

United States v. *Cole*, 463 F. 2d 163, cert. denied, 409 U.S. 942 6

United States v. *DiGeronimo*, 598 F. 2d 746, cert. denied, No. 79-5003 (Oct. 1, 1979) 9

Page

Cases—(Continued):

United States v. *Eley*, 314 F. 2d 127 6

United States v. *Grayson*, 416 F. 2d 1073, cert. denied, 396 U.S. 1059 6

United States v. *Grzywacz*, 603 F. 2d 682 9

United States v. *Lisowski*, 504 F. 2d 1268 7

United States v. *Miller*, 545 F. 2d 1204, cert. denied, 430 U.S. 930 ..... 6, 7

United States v. *Parr*, 509 F. 2d 1381 ..... 6, 7

United States v. *Pomponio*, 563 F. 2d 659, cert. denied, 435 U.S. 942 8

United States v. *Rochelle*, 384 F. 2d 748, cert. denied, 390 U.S. 946 8

United States v. *Rosenthal*, 470 F. 2d 837, cert. denied, 412 U.S. 909 8

United States v. *Swallow*, 511 F. 2d 514, cert. denied, 423 U.S. 845 8

Statutes:

Internal Revenue Code of 1954 (26 U.S.C.):

Sec. 1371 *et seq.* 4

Sec. 1371 6

Sec. 1373 4

Sec. 1374 4

Sec. 7201 ..... 2, 5

Sec. 7206(1) 2

18 U.S.C. 371 ..... 2, 5

Page

Miscellaneous:

Rev. Rul. 68-537, 1968-2 Cum. Bull. 372 4

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OPINIONS BELOW

The district court did not issue a written opinion. The opinion of the court of appeals (Pet. App. A) is reported at 610 F. 2d 570.

JURISDICTION

The judgment of the court of appeals was entered on October 3, 1979. A petition for rehearing was denied on November 30, 1979. The petition for a writ of certiorari was filed on December 28, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the indictment was sufficient to charge the crime of attempted income tax evasion.

2. Whether petitioner was prejudiced either by the government's theory of prosecution that petitioner's corporation was a "Subchapter S" corporation or by the trial court's denial of his motion for a bill of particulars.

3. Whether the trial court correctly admitted into evidence portions of statements made by petitioner's two co-defendants.

STATEMENT

After a jury trial in the United States District Court for the Southern District of California, petitioner was convicted on one count of conspiracy to defraud the United States, in violation of 18 U.S.C. 371; two counts of attempting to evade income tax, in violation of 26 U.S.C. 7201; and two counts of knowingly subscribing to materially false tax returns, in violation of 26 U.S.C. 7206(1) (Pet. App. A-1). The trial court sentenced petitioner to one year's imprisonment and imposed fines totalling $15,000 (Tr. 3255-3256).[1]

The government's case focused on petitioner's 1970 and 1971 tax returns with respect to transactions involving petitioner and International Hotel Construction and Management Company (IHCM). Petitioner and Dennis L. Lang[2] formed IHCM in early 1969 for the purpose of constructing hotels and motels and thereafter managing them. Petitioner and Lang each owned 50% of the stock. Petitioner and Lang served respectively as President and as Chairman of the Board and Secretary of the corporation.

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[1]"Tr." refers to the trial transcript. "R." refers to the two-volume Clerk's record on appeal.

[2]Lang was convicted of conspiracy and the filing of a false loan application. He did not appeal his conviction (Pet. App. A-2).

IHCM commenced operations in the Southern California area. One prospective hotel site was located in Mission Valley and a second in El Cajon. Groundwork at both the Mission Valley and the El Cajon sites began in 1970. Actual construction commenced in early 1971 when interim financing was obtained. The construction was financed by loans from Transamerica Company; the loan accounts were established so as to permit IHCM to draw on a monthly basis an amount based on the previous month's expenses (Tr. 841-842, 901; Govt. Exs. 273, 274).

In early 1970 petitioner began making extensive improvements to his La Mesa residence. A basement was dug out for this hillside house, and a master bedroom, den, family room, wet bar, laundry room, and sauna complex were built. Extensive tile and masonry work was also performed. In addition, cement driveways were poured, a new three-car garage, with guest house on top, was built, two major retaining walls were constructed, and a new kitchen was installed. As a result of these additions, the house was substantially increased in size and living area. Petitioner made extensive arrangements to insure that vendors, suppliers, and company personnel would bill approximately 80% or more of the expenses and labor charges arising out of the improvements made to his residence as expenses of IHCM. The vast majority of these expenses appeared on the corporate books as costs of construction on the two hotels (R. 2493-2570). These personal expenses, which totalled more than $35,000 for 1970 (Tr. 2522-2523) and $72,000 for 1971 (Tr. 2570), were concealed in the cost of the two hotel projects. Petitioner's tax returns for 1970 and 1971 did not reflect the income attributable to the payments by IHCM for his benefit (Govt. Exs. 188-191).

For its taxable years 1970 and 1971, IHCM filed income tax returns as a Subchapter S corporation. Upon compliance with the provisions of Subchapter S (Sections 1371 *et seq.* of the Internal Revenue Code of 1954 (26 U.S.C.)), a corporation is treated much as if it were a partnership, so that the corporate profits are taxed directly to the shareholders whether or not they are in fact distributed. 26 U.S.C. 1373. Similarly, the shareholders can deduct net operating losses of the corporation to the extent of their adjusted bases in their stock and any indebtedness of the corporation owed to them. 26 U.S.C. 1374. However, if a shareholder's bases in the stock and indebtedness are zero at the end of the corporation's taxable year, the shareholder is charged with income to the extent that he has withdrawn funds from the corporation during the year. See *Smith* v. *Commissioner*, 48 T.C. 872 (1967), aff'd, 424 F. 2d 219 (9th Cir. 1970); Rev. Rul. 68-537, 1968-2 Cum. Bull. 372.

In December 1971 petitioner's accountants advised him that he should deposit approximately $300,000 in his loan account to IHCM by December 31, 1971, because his withdrawals during the year from the corporation would exceed his basis in loans to the corporation at the end of the year (Tr. 1621-1623). As a result, Lang negotiated a $300,000 loan with the then-existing U.S. National Bank, apparently to restore a basis in petitioner's loan account. Records at the bank, however, showed the loan was made to IHCM, and not petitioner, and was disbursed on January 6, 1972, and not on December 31, 1971 (Tr. 1329-1334, 1416-1423). Despite these facts, petitioner's 1971 tax return did not reflect any income attributable to the withdrawals of cash from IHCM.

Petitioner contended at trial that the expenditures incurred by IHCM for improving his residence should have been treated as loans by the corporation to him. With respect to the income resulting from his withdrawals, petitioner maintained that the amounts of certain loans (not the January 6, 1972, loan from U.S. National) for the benefit of the corporation for which petitioner was obligated should have been credited to his corporate capital account, thereby restoring a credit balance position in the account (Pet. App. A-3).

Petitioner was tried together with co-defendants Lang and Teerlink, his original accountant, who also had been indicted for conspiracy to defraud the government in violation of 18 U.S.C. 371. Neither Lang nor Teerlink testified. The government offered prior statements by both concerning the recordation of petitioner's personal expenses on IHCM records, the corporation's accounting methods, and the need to lend the corporation the $300,000. The trial court allowed only portions of the statements to go to the jury and instructed the jury that the statements were being admitted only against the declarant and not as evidence against the declarant's co-conspirators (Pet. App. A-8 to A-9; Tr. 2025-2063, 2126-2127, 2161, 2180, 2323).

ARGUMENT

1. Petitioner contends (Pet. 5-9) that counts two and five of the indictment, charging attempted tax evasion in violation of 26 U.S.C. 7201, were defective because they did not allege the specific amount of tax due. But both challenged counts stated the amount of tax reported and then alleged that petitioner "well knew, and believed, he was obligated to the United States for additional taxes

due on thousands of dollars of concealed and unreported income" (R. 6, 9). The counts thereby clearly charged that there was a substantial tax deficiency. No more is required. See *Sansone* v. *United States*, 380 U.S. 343, 351 (1965); *United States* v. *Grayson*, 416 F. 2d 1073, 1076 (5th Cir. 1969), cert. denied, 396 U.S. 1059 (1970).[3]

2. Petitioner further argues (Pet. 10-15) that the government was guilty of "prosecutional misconduct" because it relied on a defective Subchapter S election to prove its case.[4] If, as the government contended, IHCM was a Subchapter S corporation, its false claim of expenses for construction of petitioner's personal residence resulted in petitioner's understatement of income. But as the court of appeals pointed out (Pet. App. A-12), petitioner did not raise the Subchapter S issue in the trial court either before or during trial. Indeed, only after the guilty verdict did petitioner challenge the validity of the election in a motion for a

[3]Petitioner's assertion (Pet. 9) that the amount of the tax deficiency must be alleged is contrary to the well-settled line of authorities holding that even where the amount is charged, the government need not prove that amount—rather, it must prove only that the defendant attempted to evade a substantial amount of tax. *United States* v. *Miller*, 545 F. 2d 1204, 1210 n.7 (9th Cir. 1976), cert. denied, 430 U.S. 930 (1977); *United States* v. *Parr*, 509 F. 2d 1381, 1386 (5th Cir. 1975). See also *United States* v. *Cole*, 463 F. 2d 163, 166-167 (2d Cir.), cert. denied, 409 U.S. 942 (1972) (proof of a lesser amount than the amount charged will sustain conviction); *United States* v. *Campione*, 416 F. 2d 486, 490 (7th Cir. 1969), cert. denied, 397 U.S. 909 (1970) (government need only prove substantial amount—not the exact amount charged in the indictment); *United States* v. *Eley*, 314 F. 2d 127, 130 (7th Cir. 1963) (government must prove an attempt to evade or defeat a substantial amount).

[4]Petitioner contends (Pet. 10) that IHCM's Subchapter S election (see 26 U.S.C. 1372) was invalid because neither petitioner's nor Lang's wife had signed the election.

new trial. In filing the corporate tax returns, however, petitioner treated IHCM as a Subchapter S corporation. He therefore can hardly complain that the government similarly treated the corporation as a Subchapter S corporation in proving that his personal returns were fraudulent because he failed to report substantial amounts of income derived from the corporation. See *United States* v. *Lisowski*, 504 F. 2d 1268, 1275 (7th Cir. 1974). Moreover, petitioner's defense rested on the theory that IHCM was a valid Subchapter S corporation, since petitioner's expert witness, Forest Calkins, based his computations on that assumption (Tr. 2836-2854, 2871-2878). Compare *Siravo* v. *United States*, 377 F. 2d 469, 473-474 (1st Cir. 1967). See also *United States* v. *Miller*, *supra*, 545 F. 2d at 1213-1214 n.11.

At all events, even on the assumptions that IHCM's Subchapter S election was invalid and that it should have been treated as an ordinary corporation for the purposes of taxation, petitioner was not prejudiced by the Subchapter S theory on which the trial was conducted. Petitioner contended that the corporation's payments of the home improvement expenses in each of the two years were loans. The resolution of this question of intent rests solely within the province of the jury. If the jury concluded that there was no intent to repay, then the specific items, which were substantial and alone sufficient to sustain the convictions,[5] were income under Section 61,

[5]See *United States* v. *Miller*, *supra*, 545 F. 2d at 1210 n.7; *United States* v. *Parr*, *supra*, 509 F. 2d at 1386; and cases cited at page 6 n.3, *supra*. See also *Cohen* v. *United States*, 297 F. 2d 760, 774-775 (9th Cir.), cert. denied, 369 U.S. 865 (1962). There, the court ruled that the invalidity of assessment of some of the taxes which the defendant was convicted of attempting to evade would not require setting aside the conviction.

whatever the status of the corporation. *United States* v. *Rochelle*, 384 F. 2d 748, 751 (5th Cir. 1967), cert. denied, 390 U.S. 946 (1968); *United States* v. *Rosenthal*, 470 F. 2d 837, 841-842 (2d Cir. 1972), cert. denied, 412 U.S. 909 (1973). Cf. *United States* v. *Pomponio*, 563 F. 2d 659 (4th Cir. 1977), cert. denied, 435 U.S. 942 (1978); *United States* v. *Swallow*, 511 F. 2d 514, 520 (10th Cir.), cert. denied, 423 U.S. 845 (1975). Similarly, with respect to funds withdrawn in 1971, since petitioner had no basis in either his stock or loan accounts, he received income in 1971 whether or not IHCM was a Subchapter S corporation.

3. Petitioner also asserts (Pet. 10-12) that he did not receive pretrial disclosure of the government's theory and computations. But the record convincingly refutes this claim. In denying petitioner's motion for a bill of particulars, the district court concluded (Tr. 58), in a finding upheld by the court of appeals (Pet. App. A-8), that the government had provided the defense with complete discovery in this case. Petitioner was told what specific items were involved in this case, had access to all the statements from all the government witnesses, and was provided with the computations (R. 61; Tr. 40).

Moreover, petitioner fully understood the government's case.[6] The two expert witnesses (Mr. Breese for the government (Tr. 2469-2704) and Mr. Calkins for the

[6]On October 26, 1977, two months after the trial court's denial of the motions, but a week prior to trial, the government filed its Trial Memorandum, in which it stated (page 8) that, in addition to the personal expenses being charged as ordinary income, petitioner's "failure to deposit the needed $300,000 in personal funds with the corporation in 1971 resulted in an additional sum, approximately $280,000, being charged as income to BUCKNER in 1971." This memorandum, which was served on all counsel, and which petitioner now claims he did not receive, provided petitioner with the government's trial theory.

defense (Tr. 2832-2947)) differed only in their approach to the facts and not with respect to their theory of taxation. For example, the only difference in the treatment of the personal expense items was that Breese concluded they represented income to petitioner while Calkins put the items into petitioner's loan account (although they admittedly had not been carried on the books as such (Tr. 2893, 2906-2907)) and concluded they were loans and not income (Tr. 2858, 2879). Indeed, Calkins conceded that even under his theory, if petitioner did not intend to repay the "loans," then those amounts would be taxable to him (Tr. 2897-2907). Thus, the only material point of difference between the two expert witnesses was whether petitioner intended to repay IHCM for the expenditures of its funds for his personal benefit, not whether the proceeds were taxable to petitioner if there was no intent to repay.

4. Finally, petitioner maintains (Pet. 15-19) that the trial court's admission into evidence of the statements of his co-defendants Lang and Teerlink violates the rule of *Bruton* v. *United States*, 391 U.S. 123 (1968). But *Bruton* does not require the exclusion of all statements by co-defendants. See *United States* v. *DiGeronimo*, 598 F. 2d 746 (2d Cir. 1979), cert. denied, No. 79-5003 (Oct. 1, 1979); *United States* v. *Grzywacz*, 603 F. 2d 682 (7th Cir. 1979). Compare *Dutton* v. *Evans*, 400 U.S. 74 (1970). Here, as the court of appeals properly recognized (Pet. App. A-9), the statements, as they could affect petitioner, concerned matters that were essentially conceded by petitioner—*e.g.*, that the house improvement expenses were reflected in the corporate records. In these circumstances, the statements could hardly be described as "powerfully incriminating extrajudicial statements of a

codefendant" against petitioner (*Bruton* v. *United States*, *supra*, 391 U.S. at 135). Accordingly, the trial court correctly admitted the statements. Given the lack of prejudice to petitioner, it is not surprising that the court of appeals noted (Pet. App. A-9) that "no objection [was made] to the portions of the statement which the government desired, and the court permitted, to be offered."[7]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[7]Petitioner also contends (Pet. 18-19) that because the agents had not advised Lang and Teerlink that they could have counsel present, the statements were inadmissible against petitioner. But as the court of appeals noted (Pet. App. A-10), neither Lang nor Teerlink was a subject of investigation at the time the statement was given, and no such advice was required. At all events, it is difficult to understand how petitioner could claim an invasion of his rights from the introduction of statements obtained from third parties. See *Gissendanner* v. *Wainwright*, 482 F. 2d 1293 (5th Cir. 1973).

DOJ-1980-03